No. 3033

United States
Circuit Court of Appeals
for the Ninth Circuit

T. B. STORY and L. P. WORK, Co-partners doing business under the firm name and style of STORY AND WORK

Plaintiffs in Error,

vs.

R. N. STANFIELD

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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Statement

Stripped of all surplusage of language the amended complaint in this action attempts to allege that there was a contract for the sale by defendant in error to the plaintiffs in error of seven thousand yearling ewes; that the defendant in error broke the contract and as a result the plaintiffs in error were damaged in the sum alleged in the complaint.

The alleged contract in question consisted of a series of letters and telegrams exchanged between the defendant in error and one William Rea, Jr., the agent of the plaintiffs in error. These telegrams and records

are found in the amended complaint (Record 6-16).

To this amended complaint defendant in error enterposed a demurrer. This demurrer was by the Court sustained. In his memorandum opinion sustaining this demurrer Judge Bean said:

"The demurrer to the complaint will be sustained.

"It is elementary law that to constitute a contract there must be a meeting of the minds of the parties not only as to the subject matter but also as to the extent and character of the obligations assumed by each, and if the alleged contract consists of an offer by one party by mail or by telegraph, there must be an unconditional acceptance thereof by the other in accordance with the terms of the offer, and if any conditions are attached to the acceptance or it goes beyond the offer, no contract obligation arises. (Glenn v. Birch & Sons Con. 158 Pac. 834).

"Now the offer of the defendant contained in his wire of May 25th was not unconditionally accepted by Rae nor indeed was it accepted at all in terms. Rae does not say that he will take the sheep at the price quoted by the defendant but that he had sold them, presumably as the agent of the defendant. To whom the sale was made, the time of delivery and the terms of deferred payments not stated. Moreover his wire of acceptance if it can be so construed, was not unconditional but on its face showed that the transaction was not completed and would not be until the contract which he intended mailing to the defendant was executed.

"It is true the complaint alleges that there existed in the live stock trade a well known custom and usage governing the terms of payment for stock where delivery was to be made in the future, but in the instance case it appears from the complaint that the plaintiff was endeavoring through Rea as his agent, not to purchase stock belonging to the defendant, but the de-

fendant's rights under a contract between him and plaintiff of date April 28th, and clearly the minds of the parties never met as to the terms and conditions of such purchase."

Argument

The point raised by the demurrer of the defendant in error is that these communications do not constitute a contract between the parties. In other words there was no meeting of the minds necessary to constitute a contract. It is an elementary principle that it is essential to a contract for the sale of chattels like other contracts that there must be a meeting of the minds and an agreement by both of the parties to all of the terms of the sale.

In the instance case, at most, all that can be said, is that there was a meeting of the minds upon the price to be paid for the animals. There was no meeting of the minds as to the amount of cash payment, if any, nor as to when the remainder should be paid.

In paragraph VIII of the complaint, in which they attempt to allege a custom as to the payment of the advance portion of the price, the plaintiffs do not fix any definite sum. They say, "there should be paid to the seller part of the purchase price not exceeding eight per cent of the estimated total price unless otherwise agreed upon." The very language used shows that there is no definite, certain, fixed, universal custom as to the exact amount of the advance to be paid. This allegation further shows that it is always a mat-

ter of contractural agreement. Eight per cent of the price of seven thousand yearling ewes at $11.50 per head would be $6440.00, yet the plaintiffs assumed under their alleged custom to mail check to defendant for $7,000.

There was no meeting of the minds upon the question of date of delivery, the condition of the sheep at the time of delivery, nor the place of delivery.

William Rae and the plaintiffs evidently recognized that these telegrams did not constitute a contract because in Rae's second telegram to Stanfield, which by the way was sent to Stanfield, Oregon, at a time when Stanfield's telegram showed he was in Portland, Oregon, Rea said: "Sold Story and Work seven thousand yearling ewes for $11.50. ***Mail you contract and check for $7,000 tomorrow.***"

Even had Stanfield in his telegram not only stated price but the date of delivery, terms of payment, etc., this reply telegram of William Rea would not have constituted an unconditional acceptance of Stanfield's offer. At most, all that could be said of Rea's second telegram would be that the offer was accepted subject to the conditions and terms contained in a contract which Rea was sending to Stanfield. Stanfield, until he received this contract and signed the same and agreed to its terms, could not hold Rea. By the same reasoning neither Rea nor his principal could hold Stanfield until Stanfield had agreed to the terms of the condition upon which Rea accepted Stanfield's offer,

provided the offer had contained and embodied therein all the essentials necessary to constitute a contract. We, of course, maintain that the telegram from Stanfield was insufficient for this purpose.

The law is well settled that in order to constitute a binding contract all the terms the parties had in contemplation must be agreed upon.

Brophy v. Idaho P. & P. Co., 31 Mont. 279.

Monahan v. Allen, 47 Mont. 75, 130 P. 768.

Gill Mfg. Co. v. Hurd, 18 Fed. 673.

One question to determine is whether the terms in the instance case were agreed upon.

If it is said that the law would construe the negotiations as meaning that delivery and payment should be concurrently, and both be within a reasonable time, we answer that such rule cannot apply to this case because R. N. Stanfield knew he had not possession of the sheep or the right to possession until July 1st, 1917. That Stanfield must have, and did, contemplate, further negotiations and settlement of terms is shown by his telegram.

In Monahan v. Allen, 47 Mont. 75, it was held that an offer to buy land "$5000 cash and remainder to be paid in such terms and agreements as may hereafter be made," and accepted on such terms was too vague, indefinite and uncertain as to form the basis for a contract.

Monahan v. Allen, 47 Mont. 75, 130 Pac. 768 (1913).

The court, in the above case, quotes from Section 27, Page on Contracts, thus:

> "an offer, even if intended to create legal relations, must be so complete that, upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not."

The court says, further:

> "If then, the offer is indefinite, and material terms are left for future negotiations, the acceptance, which must correspond with the offer cannot aid it."
>
> "In Long v. Needham, 37 Mont. 408, 96 Pac. 731, this court stated the rule as follows: 'An agreement to be finally settled must comprise all the terms which the parties intend to introduce. An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement until the terms of that agreement are settled.' "
>
> "That Allen's offer and Monahan's acceptance of it did not conclude the negotiations was thoroughly understood by both parties. The writing, on its face, provides for further treaty arrangements, and some of these negotiations were subsequently carried on."
>
> Monahan v. Allen, 47 Mont. 75.

If we substitute the word "Stanfield" for Allen and "Rea" for Monahan, we have the case at bar. If Stanfield had sued Rea for failure to accept the ewes and pay the purchase price, the answer of Rea in court that there was no contract for the reason that the terms had not been agreed upon and that Stanfield was unable to deliver until after July 1st would have absolved Rea from liability. If one party is not bound, the other is

not;—there must be mutuality.

A contract is not made so long as, in the contemplation of both parties thereto, something remains to be done to establish contract relations; the law not making a contract when the parties intend none, and not regarding an arrangement as completed which they regard as incomplete.

Central Bitulithic Paving Co., v. Village of Highland Park, 129 N. W. 46, 17 Detroit Leg. N. 1078.

The offer must be one which is of itself intended to create legal relations on acceptance and the offer intended to create legal relations must be so complete that on acceptance an agreement ***containing all the necessary terms is formed.***

Elks v. North State Life Ins. Co., 75 S. E. 808 (N. C.)

A contract is not complete by proposition and acceptance thereof, by correspondence, where essential matters affecting the rights of the parties are left open for further consideration.

Brown v. New York Cent. R. Co., 44 N. Y. 79.

No contract ought to be held established if it is clear upon the facts that there were other conditions of an intended contract beyond and besides those expressed in the letters, and without the settlement of which the parties had no idea of concluding any agreement.

Hussey v. Horne-Payne, 4 App. Cas. 311, 48 L. J. Ch. 846, 41 L. T. N. S. 1, 27, Week. Rep. 585.

Although the mere fact that the agreement is to be reduced to writing will not prevent a contract from arising, this statement is subject to the provision that all the terms of the contract contemplated by the parties have been agreed upon.

Long v. Needham, 37 Mont. 408, 96 Pac. 731.

For such general statements of the law see:

Ann. Cas. 1912. B., 130 (note).

Where an agreement was to be reduced to writing, and there is no evidence from which its exact terms could be inferred, it will be presumed that the parties understood that there was to be no contract until the terms were reduced to writing.
Methudy v. Ross, 81 Mo. 481.

Mere acceptance of a proposal to do certain work does not create a contract between the parties, where neither the offer nor the acceptance settle certain necessary details, and where the parties, at the time the acceptance is given, agree to thereafter make a written contract embodying the still unsettled details.
Jersey City Water Com'rs v. Brown, 32 N. J. Law (3 Vroom) 504.

If the negotiations only cover part of the terms to be settled by the contract, and the understanding is that the other terms shall be settled and put into a formal contract, and those terms cannot afterwards be agreed upon, there will be no enforcible contract between the parties.
Connery v. Best, 1 Cab. & El. 291.

Where it was agreed, after arranging the terms of the proposed contract, that the contract should be reduced to writing, and signed by the parties, and afterwards some of the parties refused to sign the writing, on the ground that it included matters not agreed on, it shows that the minds of the parties did not meet.
Bryant v. Ondrak, 87 Hun., 477, 34 N. Y. Supp. 384.

Where some of the material features of the contract are left to future agreement to be incorporated in a writing, there is no contract.

Cincinnati Equipment Co. v. Coal Co., 164 S. W. 794 (Ky.)

The negotiations were not complete and were not such as the law can imply. As above shown the law could not imply payment and delivery and the other terms in this case because Stanfield knew he had no sheep to deliver until July 1st, and contemplated further negotiations and Rea also contemplated further negotiations. Further Stanfield did not know but what Rea, or his undisclosed principal would demand delivery at a date later than July 1 and at some other place than White Sulpher and Three Forks.. If, in addition to the above it is shown, as here, that the parties intended to have the agreement reduced to writing and the negotiations settled in that manner, we submit there is no contract.

The acceptance is conditional, in that it refers to and makes the acceptance conditional upon the contract mailed.

This fact alone is sufficient to show that there was no meeting of minds and hence no contract.

In Runyon v. Wilkinson Gaddis & Co., a New Jersey case, reported in 31 Atl. 390, the proposing purchaser cabled: "accept 370; half cash, half debentures. *Contract mailed.*" "It was conceded that the terms were settled and that the telegram would have been an acceptance if it had not referred to "contract mailed," which contract, as in the case at bar, contained additional terms not included in the offer.

The court, in its opinion, says of the above mes-

sage:

> "It is upon this message, read in connection with the previous letters, that ***plaintiff in error now now contends that he ought to have been permitted to go to the jury*** upon the question whether or not a completed contract of sale did not arise therefrom. ***But this contention rests upon an inadmissible construction of the cablegram. It was not an unqualified acceptance of the offer of sale.*** On the contrary, ***it was qualified by the connection of the acceptance with the contract which it stated had been mailed.*** It was an acceptance according to the contents of that contract. Such was the construction given to the message by the trial judge, and in that there was no error." (Italics ours.)
>
> Runyon v. Wilkinson Gaddis & Co., 31 Atl., 390, (1895).

In Long v. Needham, 37 Mont. 408, 96 Pac. 731, the offer was definite in terms and provided that the papers should be placed in escrow. The acceptance was in these words: "Offer accepted, will send papers to Fergus County Bank for signature." This was held to be an acceptance, the terms being agreed upon. The court says on page 417:

> "If Needham's telegram, (the one above set out) had referred to a letter which was to follow, Long would then have been put upon notice that he must await the arrival of such letter and would be bound by it."

The court then cites the New Jersey case above.

Stanfield, by Rea's telegram, was notified that a contract was coming and that the acceptance was conditioned on Stanfield's agreeing to the terms of the contract which were different and additional to those con-

tained in the telegram. A complete answer by Rea, or Story & Work, to a suit against him, or them, by Stanfield, or his assigns, would be that the acceptance was conditional, that Rea distinctly notified Stanfield by the telegram that a contract was submitted containing the terms on which Rea would accept the offer, and that there was no contract until those terms had been consented to. A contract must be mutual, and if Rea or Story & Work are not bound, Stanfield is not bound.

In their brief counsel for plaintiff in error lay great stress on the fact that in his letter to Rea defendant in error bases his refusal upon the ground of failure to immediately accept. This argument is not sound and does not by interpretation make certain what never was certain. It does not accomplish a meeting of the minds on all the terms of the proposed contract.

Other cases in point follow:

> ***Although the letter states that the writer has agreed to the proposition, yet there will be no contract if the letter also states that a contract is to be executed.***
>
> Wood v. Edwards, 19 Johns 212.
>
> A letter stating, "***We accept***" the offer "and ***now hand you two copies of the conditions of sale*** which we have signed; we will thank you to sign them and return one of the copies to us,"—will not constitute a contract until the copies are signed. (Italics ours).
>
> Crossley v. Maycock, L. R. 18 Eq. 180, 43 L. J. Ch. 379, 22 Week., Rep. 387.
>
> Acceptance of an offer does not show a meeting of the minds of the parties where the party ac-

cepting the offer, on the subsequent presentation of a written contract for him to sign, containing the terms of the offer, made certain alterations therein which the other party refused to accept. Kirwan v. Byrne (Com. Pl.) 9 Misc. Rep. 76, 29 N. Y. Supp. 287.

Where B telegraphed in answer to A's offer: *"Have written you;* will take land at your figures. Answer." The telegram refers to the letter as containing the acceptance, and is not in itself an unconditional acceptance.

Baker v. Holt, 14 N. W. 8 (Wis.).
A contract for the sale of goods was not complete where there was an offer to buy at a given price, which was answered substantially in these terms; "Will accept. Reasonable time for delivery. Please name limit,"—no limit being at any time named, so far as appears.
Decker et al v. Gwinn et al, 20 S. E. 240.

That this is the law on the subject is shown by the above cases. In case of Cornish v. Woolverton, 32 Mont. 456, the court says:

"Section 2207 (now section 5031) of the Civil Code provides: 'Several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together.' Under the rule of construction here declared, the conditions and stipulations embodied in the one must be construed to enter into and constitute a part of the other. *So that, if the mortgage referred to in the note contains conditions which render the note uncertain as to the amount to be paid and the time of payment, these must be read into the note.* The two must be read and con-

strued together to *ascertain the nature of the agreement* upon which the negotiable character of the note depends. The reference to the mortgage *brings to the notice of everyone dealing with the note all the conditions attached,* so that even though it should be held negotiable so far as concerns the conditions expressed upon its face, it negotiable character must be determined by the provisions of the mortgage. This section of the statute sets at rest any question which might otherwise exist as to the rule of construction applicable. *The note and mortgage refer to each other.* They are contracts relating to the same subject matter. *They are between the same parties. They are both parts of substantially one transaction.* Therefore they constitute one contract. (Meyer v. Weber et al, 133 Cal. 681, 65 Pac. 1110.)"—The italics are ours.

The court was speaking of contracts. We believe there was no contract in the case at bar, but the language is applicable to the negotiations in the present case.

The telegram referred to a contract to be sent. Stanfield could not assent to that contract, and the terms therein contained, until he received that contract. There could be no contract until Stanfield communicated his assent to those terms to Rea. The alleged acceptance was conditional in even referring to a contract to be sent which might, or might not, but which did, contain terms inconsistent with the offer.

The alleged acceptance is conditional *and* ambiguous.

Stanfield did not appoint Rea his agent. He made the alleged offer of sale to Rea. In addition to referring to a contract and making his acceptance conditional on the terms therein contained, Rea fails to "accept" the offer, or to use any language equivalent to an acceptance. He says: "***Sold*** your Story-Work seven thousand ewes." Rea failed to do the act called for by the alleged offer. The alleged offer called for an acceptance. An acceptance must be communicated. It is elementary that an offer calling for a promise cannot be accepted by doing an act instead.

By dealing in the manner he did with the property Rea rejected the offer.

The case of Martin v. Northwestern Fuel Co. 22 Fed. 596 is in point on this question.

> In that case in reply to a proposition made by the plaintiff by telegraph to sell coal at a certain figure, the following telegram was sent: "Telegram received. ***You can consider the coal sold*** Will be in Cleveland next week and arrange particulars." Judge Brewer, in writing the decision, said that the expression, "you may consider the coal sold," was not a natural one when a definite acceptance of an offer was intended, but was merely an acknowledgment that a contract might be easily agreed upon.
> Martin v. Northwestern Fuel Co. 22 Fed. 596.
>
> A letter in reply to an offer to sell land on certain terms, in the following words: "Have twice attempted the tender of the first payment of $500 upon the agreement made between us

on the 7th December last. I will meet you," etc., "when I shall be ready to make tender of the money, and execute the proper agreements thereupon" does not constitute an acceptance of the offer.

Potts v. Whitehead, 23 N. J. Eq. (8 E. Green) 512.

A offered his farm to B at a certain price. B wrote: "I have concluded to purchase the farm at your price," naming it. B replied by letter accepting the alleged offer. Held there was no binding contract, since the letter was not an acceptance.

If the bargain was already made, as the answer assumes, why send a contract containing different and additional terms and why consider the contract so important that reference thereto must be made in the telegram?

In this connection, we cannot emphasize too strongly that a contract must be mutual and that there would be no chance in the world for Stanfield to hold Rea as on a binding contract under the negotiations in this case.

Rea would answer that he intended delivery at once, and Stanfield would have to say he intended delivery July 1st. There was hence no meeting of minds on one of the material terms.

Rea would say: I conditioned my acceptance on the condition in the contract I referred to and made a part of my acceptance by wire, and the courts would say that the telegram referred to the contract which was to follow and conveyed the information that the ac-

ceptance was conditional on the execution of it according to the different and additional terms therein contained. We submit that Rea would not have been bound and that Stanfield should not be held to be. If Rea would not have been bound Story & Work would not be bound, and Stanfield should not be held to be bound.

In Uttey v. Donaldson, 94 U. S. 29, 24 L. Ed. 54, where the offer was made and accepted, by wire, unconditionally, and the subject matter delivered the same day, the court held that a qualification in a letter received four days later was ineffective to change the contract, the court saying, "If the defendants intended to qualify, it should have been done in the despatch." *This is just the method Rea adopted to make his acceptance conditional and qualified.* This gave Stanfield notice that Rea had not accepted the offer as made, that Rea was sending a contract which contained the terms on which he would buy.

The case of Long v. Needham, 37 Mont. 408, is in accord with Uttey v. Donaldson, supra, in holding that the defendant could not on the following day vary the terms theretofore agreed upon by telegrams and letters.

In Uttey v. Donaldson, supra, the supreme court of the United States says, "If the defendant intended to qualify, it should have been done in the despatch." In Long v. Needham, supra, the Montana court says if the telegram had referred to a letter the acceptance would

have been qualified.

Long v. Needham decided that where the minds of the parties had ***fully met*** in letters and telegrams between them, and the acceptance was ***not conditional*** and ***did not refer*** to any written contract, an enforceable contract was made even though they may have contemplated that their views should afterward be reduced to a more formal writing.

Wm. Rea inquired as to the price and the offer was sent to him. Nothing was said to show he was an agent. Wm. Rea purports to accept. Can one to whom the offer was not made step in and say to Stanfield, "You made the contract with me."

In Glenn v. S. Birch & Sons Construction Co., 52 Montana, 414, the same question arose. In that case it seems that the defendant had some notice that the sale of the bonds was to be made to a trust company and the plaintiff requested that defendant make out the contract to the trust company.

The plaintiff refers to his commissions in his final letter set out on page 418 of the opinion.

The court in holding that there was no contract, says:

"Its proposition was to sell to plaintiff not to another person. The negotiations had been made with him. It had had an opportunity to satisfy itself that he was a suitable person to establish contract relations with. This was one thing. It was quite another for the plaintiff to couple with his acceptance a proposal

that defendant should enter contract relations with a third party, about which it ostensibly had no knowledge, under stipulations and conditions not disclosed to defendant until it had received plaintiff's letter of October 9, containing full information as to the obligations defendant was to assume toward the obligee, substituted by plaintiff in his stead. If it be conceded that the German American Trust Company had been mentioned by plaintiff to the agent of defendant during his visit to Great Falls early in October, as is intimated in the letter of October 9, there is nothing in the complaint disclosing what was said or what, if any, understanding was reached at that time."

It does not appear whether the agency doctrine of undisclosed principal was presented to the court in the above case and we are not going into this any further, for it is plain that if there was no contract with Rea, as we think we have shown in this brief, there could be no contract with Story & Work, or any one else.

There is one further point we will mention briefly. The alleged offer was sent from Portland, Oregon. Wm. Rea sent his wire purporting to accept to Stanfield, Oregon. We think that the dating of the offer at Portland was sufficient notice to Rea to send an acceptance to Portland, especially so, as the offer says, "subject to immediate acceptance." The offer was sent from Portland to Billings, the place from which the inquiry came and forwarded to Butte, where Rea

then was. Rea purported to accept by wiring to Stanfield, Oregon. The offer certainly contained an implied term that the acceptance should be sent to Portland. The telegram was not delivered until after Stanfield sold the sheep.

The same state of facts was presented to the Supreme Court of the United States in Eliason v. Henshaw, 17 U. S. (4 Wheat.) 225, 4 L. Ed. 556.

A offered to purchase flour from B at Mill Creek, to be delivered at Georgetown, and sent the letter by wagon from Harper's Ferry, near which place he then was, saying, "Please write by return of wagon whether you accept our offer." B sent the acceptance to A's place of business at Georgetown, where A actually received it. There was held to be no contract because of failure to comply with the terms of the offer as to place of acceptance, the court saying:

> "It is an undeniable principal of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either. . . . . Whatever uncertainty there might have been as to the time when the answer would be received there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place,

therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer."

Eliason v. Henshaw, 17 U. S. (4 Wheat.) 225, 4 L. Ed. 556.

As a matter of fact, due to the alleged offer having been delayed in delivery to Rea by his departure from Billings after he sent the inquiry, and due to the fact that the alleged acceptance was deposited with the telegraph company in the night time and was addressed not to Portland but to the town of Stanfield, R. N. Stanfield did not receive the same until several days after the alleged offer was sent and not until after he had disposed of the ewes.

Custom Cannot be Resorted to for the Purpose of Creating a Contract.

In the first place usage or custom is not properly pleaded in the complaint.

A party who relies on a local custom forming part of a contract must plead the custom so explicitly that it will appear not only that the custom existed but that both parties had knowledge of it at the time of making the contract, and *that they contracted with reference thereto.*

Staroske v. Pulitzer Pub. Co., 138 S. W. 36 (Mo. 1911).

Where plaintiff pleaded that "in accordance with the

custom of the trade," in Poland v. Hollander, the court said:

"The allegation as to custom of trade in this instance does not save the pleading because there is no averment that the custom is general or uniform, or that it existed for a sufficient length of time to bind the defendants, or that the defendants dealt with a knowledge, or that it was definite and certain as to the exact amount of advance payment which should be made."

If the contention of plaintiff in error is correct, then under this alleged custom plaintiff in error would have had the option of making any advance payment he might desire from one cent per head to eight per cent of the contract price. On the face of the pleading the alleged custom is no custom. There is nothing definite, fixed or certain about it.

The Supreme Court of Oregon in the case of Oregon Co. v. Elmore Packing Co., 138 Pac. 862, in speaking of this, said:

> "The only evidence offered by the plaintiffs on that point was that of three witnesses, to the purport that there was a general usage on Tillamock Bay that fishermen delivering fish to any cannery were in the employ of such cannery or packing company. It will be remembered that no plea of custom or usage appears in the complaint. If one would rely upon a custom, he should plead the same and not only so, but should state that the custom was known to the party to be affected by the same, or should allege facts authorizing the conclusion that it was of such general notoriety that the other party would be presumed to have knowi-

edge of the usage.

"Moreover, it is laid down in section 727, L. O. L., that evidence may be given of 'usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation. It thus appears that custom is to be used in evidence only as a means of interpretation of a contract, and not for the purpose of proving the agreement itself. The consequence is that if nothing but custom be shown, there is no proof of a contract arising between the two parties. Holmes v. Whitaker, 23 Or. 319, 31 Pac. 705; Savage v. Salem Mills Co., 48 Or. 1, 85 Pac. 69, 10 Ann. Cas. 1065; Barnard v. Houser, 137 Pac. 227. The circuit court was in error in refusing to take from the jury the evidence of custom alluded to."

If one would rely upon a custom he should plead the same, and not only so, but should state that the custom was known to the party to be affected by the same, or should allege facts authorizing the conclusion that it was of such general notoriety that the other party would be presumed to have knowledge of the usage.

Oregon Fisheries Co. v. Elmore Pkg. Co., 138 Pac. 862.

A custom is binding only when it is of such universal practice as to justify the conclusion that it became by implication, a part of the contract.

Maddox v. Washburn-Crosby, 69 S. E. 821 (Ga.).

But even if custom was properly pleaded, we believe we have shown that no contract was created, and hence custom has no place in this case.

As was said by the Supreme Court of the United

States in Thompson v. Thompson, 18 Law Ed. 704, 707, "Where there is no contract, usage will not make one . . . . . ."

This is so well settled as to need but little discussion.

In the case of Tilley v. City of Chi. & Co. of Cook, 26 L. Ed. 374, the court said:

> "Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. Hutchinson v. Tatham, L.R., 8 C. P., 482, Field v. Lelean, 30 L. F. exch. 168, Bywater v. Richardson, 1 Ad. & E., 508; Robinson v. U. S., 13 Wall., 363 (80 U. S., XX., 653.)"
>
> "In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. Holding v. Pigott. 7 Bing., 465,474; Clarke v. Roystone, 13 Mees. & W. 752; Yeata v. Pim. Holt, N. P., 95; Trueman v. Loder, 11 Ad. & E. 589; Bliven v. N. E. Screw Co., 23 How., 420 (64 U. S., XVI., 510)."
>
> "The inference from these principles is inevitable that unless some contract is shown, evidence of usage or custom is immaterial."

And again the same court in the case of Bank v. Burkhardt, 25 Law, Ed. 766, said:

> "A general usage may be proved in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing.
>
> "Usage cannot make a contract where there is

> none, nor prevent the effect of the settled rules of law. Barnard v. Kellog, 10 Wall., 390, 19 L. Ed. 514; Collender v. Dinsmore, 55 N. Y., 200; Adams v. Goddard, 212; Thompson v. Riggs, 5 Wall. 674, 18 L. Ed., 706; Dykers v. Allen, 7 Hill, 497."

In the case of Pencil Co. v. Nashville etc. Ry. Co. 32 L. R. A. (N. S.) 323, the court defines the difference between "custom" and "usage" and holds that usage cannot make a contract.

The court said:

> "We cannot bring ourselves to the conclusion that a bill which bases the complainant's rights to recover upon the breach of a contract can be sustained by proof of a usage and no proof of a contract, or by proof of a custom and no proof of a contract . . . . . ."

The above cases of the highest court in the land would seem to determine the question of usage or trade. As we have attempted to show under previous heads of this brief, *custom or usage could not apply in this case because the parties intended to fix the terms of the contract themselves, as is shown by the correspondence and all the surrounding circumstances.*

In adjudicating rights under a contract, a court's only office is to enforce such rights as fixed by their own agreement; it cannot make a contract for them and determine their respective rights accordingly.

As is set forth in "Exhibit A," attached to the plaintiff's amended complaint, the beginning of this transaction is evidenced by a contract in writing on the 28th

day of April, whereby Story and Work contracted to sell to the defendant Stanfield seven thousand yearling ewes at $10.00 per head, the same to be delivered at White Sulpher Springs and Three Forks, Montana, on July 1, 1917. On this contract Stanfield had paid Story and Work $4,000.00, the remainder to be paid when the live stock was delivered.

Stanfield never owned the seven thousand ewes. All that he ever owned was a contract for the purchase of same on which he had paid $4,000.00. These facts were all known to Rea at the time he sent the initial telegram to Stanfield. It is admitted both in he brief of counsel for plaintiffs and in the amended complaint that in conducting these negotiations Rea was acting as the agent of, and for and on behalf of the plaintiffs, Story and Work, who had contracted to sell these identical sheep to the defendant.

In paragraph V of the amended complaint the pleader uses this language:

> "The plaintiffs, desiring to purchase from said Stanfield, the defendant herein, the said ewes, and to purchase all of his rights in said contract for the sale of said ewes, as aforesaid, the said Rea acting as broker in that behalf sent said defendant at his home in Oregon, from Billings, in the state of Montana, a telegram reading as follows, etc."

Again in paragraph VI of the amended complaint he uses this language:

> "The said Rea accepted for himself and on behalf of the said Story and Work the offer so made, etc."

From an analysis of the original contract from Story and Work to Stanfield and from an analysis of paragraph V of the amended complaint and the admissions of counsel for plaintiffs in his brief, it must be conceded that all that Stanfield had a right to sell was his contract. This was not an ordinary transaction, as would take place between a grower and a man who wants to purchase sheep from the grower, or owner in possession, because the ewes referred to were not in the possession of Stanfield. It was known to both parties that all that Stanfield had or could sell was a ***right to purchase.***

To apply the fine haired reasoning of the counsel for plaintiffs, the telegram from Rea to Stanfield must be interpreted thus:

> "What will you take for contract to purchase the seven thousand Story and Work yearling ewes."

Stanfield's reply must be interpreted thus:

> "I will sell my contract to purchase the Story and Work yearling ewes on the basis of $11.50 per head. In other words, you pay me back the $4,000.00 advance that I paid on these sheep and $1.50 profit, being the difference between $10.00 per head, I was to pay for sheep and $11.50 and I will assign to you my contract."

Neither Stanfield nor any other man dealing in live stock, who has a contract similar to this would sell anything other than a contract. If he was selling his contract he would certainly want all his money before the delivery and assignment of the contract so that he could take his profit, assign his contract and end the trans-

action in so far as he is concerned.

This is the only logical conclusion that can be reached. Counsel has admitted both in his pleading and in his brief that all Stanfield had a right to sell and all that they were intending to buy from him was his contract.

This being true, then how or by what manner of reasoning can you read into these telegrams the matters counsel attempts to read into them? How, or by what manner of logical deduction can you say that Stanfield would assign his contract to Story and Work and then wait until July 1, for Story and Work to pay him the difference of $1.50 per head, being the difference between price at which the contract to sell ewes and the price at which they were buying same back. Such reasoning it seems to us is absurd.

We believe that from any one of the many reasons presented it can be seen that there was no contract.

Some courts have held that there was no contract on the grounds set forth in the first subdivision of this brief; some courts have held there was no contract on the grounds set out in each and all of the other subdivisions. Certainly, when all the grounds are present in one case, there is no contract.

We have refrained from making any statement as to the equities of the case, and have tried to present the matter strictly as a question of law, and shall only say that it would be a harsh ruling that requires, under the facts in this case, one man to hold his goods, on a fluctuating market, at the pleasure, disposal and caprice of

another, with whom he did not know he was dealing, for an indeterminable length of time and an indefinite time of payment, when the now alleged agent of that other by his telegrams of purported acceptance expressly warned the offeror that a written contract, of which the offeror had no knowledge, and had not consented to, was being forwarded for him to execute.

We submit that the demurer to the complaint should be sustained.

Respectfully submitted,
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